

MEMORANDUM

TO: Members, Clark Fork Basin Water Management Task Force
FROM: Gerald Mueller, Project Coordinator
SUBJECT: Summary of the October 6 Meeting
DATE: October 21, 2003

Participants

The following members of the Task Force were present:

Task Force Members:

Eugene Manley	Granite County
Harvey Hackett	Bitterroot Water Forum
Fred Lurie	Blackfoot Challenge
Bill Slack	Flathead Irrigation District
Holly Franz	PPL Montana
Elna Darrow	Flathead Basin Commission
Steve Fry	Avista Corp
Jim Dinsmore	Upper Clark Fork
J. Gail Patton	Sanders County.
Marc M. Spratt	Flathead Conservation District

Staff:

Gerald Mueller	Montana Consensus Council (MCC)
Mike McLane	Montana Department of Natural Resources and Conservation (DNRC)

Meeting Goals

1. Prioritize management plan issues
2. Discuss enforcement issues
3. Discuss hydropower water rights and future water development
4. Discuss conservation options
5. Review plan outreach

Management Plan Issues

State law directs that the water management plan address three issues: options to protect the security of water rights; the orderly development of water; and the conservation of water in the future plan. The outline of the management plan currently provides that Chapter 3 will address other basin wide issues. The Task Force members identified two types of the other issues, longer-term issues that affect basin water management but which cannot be resolved by the plan, and shorter-term issues that the plan might address directly.

Longer-Term Issues - The Task Force members agreed that the plan should report on the status of three issues, the state - Salish and Kootenai Tribe water rights compact negotiation, the application the Endangered Species Act in the basin, and the interaction of water quality and quantity regulation. The Task Force also agreed to consider the following recommendations concerning these issues:

- The state and the Salish and Kootenai Tribes should move as rapidly as possible to resolve definitively the status of the Tribes' water rights through negotiation or litigation.
- The preferred solution to the listing of the salmon and bull trout should be determined and its implications for basin water management specified.

Other Issues - The plan should address the following issues:

- Education regarding water use and water rights;
- Water rights enforcement;
- Hydropower water rights and their effect on future water availability;
- Water development, including more effective management and use of existing water storage (structural and ground) and distribution systems;
- Water management in times of short supply; and
- Ground water/surface water interactions.

Concerning water management in times of short supply, the Task Force agreed to review existing drought management plans within the basin and in other basins and obtain a legal analysis of the implications of formal and informal drought management actions.

Discuss Enforcement Issues

The Task Force noted that enforcement issues differ depending on the date of the water rights in question. Concerning pre-1973 water rights, with limited exceptions, enforcement action must be initiated by individual water rights holders in state district court. The initiated in district court by the Department of Natural Resources and Conservation (DNRC) may initiate an action in district court because a water user has violated the Water Use Act by changing a pre-1973 use without a permit or is wasting water. Regarding water right permits issued by pursuant to the 1973 Water Use Act, DNRC can take enforcement action by going to court and asking it to enjoin and fine illegal acts.

Pre-1973 Water Rights - In basins with an enforceable water rights decree, the water rights holders can petition district court to appoint a water commissioner to enforce the decree. The cost of the commissioner is now divided among those right holders who receive water according to the amount of water they receive. Two alternatives to fund the water commissioner are:

- Have DNRC hire and pay commissioners; and
- Require all water rights holders under the decree divide the commissioner costs according to the percentage share of the total water rights.

Two enforcement related problems exist within the adjudication system. The first is addressing erroneous water rights claims. The Water Court is now relying on objections by individual water rights holders before taking action to correct claims. The burden of making such objections on the individuals may be onerous. One alternative mechanism for correcting water rights claims could be empowering an institutional objector, such as the Attorney General or the DNRC, to examine and pursue erroneous claim before the Water Court. Another might be having the Water Court on its on motion examine and rule on erroneous claims. The second problem is the need for timely adjudication decisions. An alternative that might speed up the slow pace of the current process would be to empower water masters to issue decisions more quickly and cheaply.

In basins without decrees, an individual water rights holder must file a complaint in district court and seek injunctive relief. If the complaint requires determination of who has what water right,

the district court must request that the Water Court certify to district court an adjudication of the rights in question. The district court can then act on the original complaint and take enforcement action. The cost and timeliness of this relief is likely to be such that enforcement is not practical in many instances. An alternative to the existing situation would involve empowering DNRC to investigate and regulate water use at least until a final decree is issued.

Post-1973 Water Rights - Although DNRC has the authority to initiate district court enforcement, apparently as a matter of policy and because of insufficient staffing and funding resources, the DNRC now rarely does so. Options identified to remedy this situation included:

- Empowering DNRC to issue fines using authority similar to that exercised by the Montana Department of Environmental Quality in enforcing air and water quality standards;
- Providing more resources so that DNRC can use its existing authority to verify and enforce water rights;
- Institute surface and/or ground water rights basin closures; and
- Utilizing court appointed or DNRC mediators to resolve enforcement issues.

Hydropower Water Rights and Future Water Development

The Task Force discussed the hydropower water rights held by both Avista and PPL Montana and their implications for future water development. As noted at previous Task Force meetings, Avista's Noxon Rapids/Cabinet Gorge water right is filled only three years in ten and then only for a matter of a few days during high run off. Since a Water Court Judge has affirmed the validity of Avista's water rights, additional water is apparently available for future appropriation only a few days per decade. This issue is the genesis for the Task Force. In 2000, prior to passage of the statute that authorized the Task Force, the state and Avista negotiated an agreement that addressed Avista's water rights and increased security for water user junior to Avista. The agreement would have closed the Clark Fork basin to issuance of most new surface water rights until such time as Avista issued a water rights call on junior rights holders. The agreement also provided that if Avista believed that a water rights call was pending, it would notify and the state so that unspecified steps might be taken to alleviate the necessity for a call. The unspecified steps discussed included triggering voluntary drought management plans adopted locally throughout the basin that would share the shortage among Avista and the other water users. The agreement was abandoned when the Federal Energy Regulatory Commission refused to incorporate it into Avista's license for the Noxon Rapids/Cabinet Gorge project. The Task Force agreed to review the details of the negotiated agreement and consider whether to seek an alternative means for memorializing it such as including it in the state water plan.

Discuss Conservation Options

Because of mix up in inviting Mr. Harry Whalen with Montana Rural Water to this meeting, his presentation on conservation alternatives was deferred until the November meeting.

Plan Outreach

Because of time constraints, discussion of public outreach for the water management plan was also deferred until the November meeting. A web page, announcing and posting Task Force work products was developed by DNRC. The address was sent to all Task Force members' email address.

Homework Assignment

Prior to the next Task Force meeting, members agreed to:

- Prepare for a discussion of the options for conservation of water in the future; and
- Review the meeting summary and a draft issue paper addressing other basin water issues, including water rights enforcement.

Next Meeting

The date, time, and place of the next meeting was set for Monday, November 10, 2003 at 9:00 a.m. in the DFWP conference room at 3201 Spurgin Road in Missoula. The agenda will include:

- Discussion of the options for conservation of water in the future;
- Review of existing drought management plans;
- Identification of the means of addressing the issues list and developing chapter 3 of the plan;
- Discussion of the state-Avista agreement; and
- Discussion of the plan public outreach.